

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PATRICK WILLIAMS
Claimant,

vs.

WELLCO TANK TRUCKS, INC.
Respondent,

CS-00-0168-459
AP-00-0449-998

and

COMPSOURCE MUTUAL INS. CO.
Insurance Carrier.

ORDER

Claimant requested review of the March 5, 2020, Award issued by Administrative Law Judge (ALJ) David J. Bogdan.

APPEARANCES

Michael J. Unrein appeared for Claimant. Timothy A. Emerson appeared for Respondent and Insurance Carrier. Board Member Rebecca S. Sanders recused herself from these proceedings, and Mark E. Kolich was appointed Board Member Pro Tem.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award. The Board also reviewed the parties' briefs and heard oral argument on June 18, 2020. At oral argument, the parties stipulated Claimant's average weekly wage for Respondent was \$745.45.

ISSUES

1. Whether the use of the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, in determining Claimant's functional impairment is constitutional?
2. What is the nature and extent of Claimant's disability, including the extent of Claimant's functional impairment and entitlement to permanent partial disability based on work disability?
3. Is Respondent entitled to a credit against an award of permanent disability compensation for an overpayment of temporary total disability compensation?

4. Is Claimant entitled to an award of future medical treatment?

FINDINGS OF FACT

Claimant is forty-seven years old and resides in Topeka, Kansas. Claimant obtained a GED and attended vocational schools for training in welding and commercial HVAC. Claimant holds a CDL with Hazmat and Tanker endorsements, but his Hazmat certification is not current. Claimant's medical history is notable for a prior workers compensation injury. Claimant received a settlement for the prior injury based on 10% impairment, presumably to the body as a whole, for a closed-head injury and a right shoulder injury. Claimant's medical history is notable for other injuries not involving the right shoulder or neck.

Claimant worked as a flatbed truck driver for Respondent from 2014 through February 3, 2015. Claimant hauled railroad equipment to the BNSF facility in Topeka. Claimant supervised the loading of equipment on the flatbed, but did not normally load the flatbed, himself. Claimant moved blocks and secured the load on the trailer after it was loaded. The parties stipulated Claimant's average weekly wage for Respondent was \$745.45.

On February 3, 2015, Claimant was chaining down a load on the flatbed and he felt a pop in the upper right shoulder and neck. Claimant continued working and felt a second pop, followed by pain and a burning sensation from his neck down the right arm to the fingers. Claimant was unable to lift his right arm. Claimant reported his injury to Respondent.

Claimant initially treated at Cotton/O'Neil/Express Care Clinic, and he was referred to orthopedic surgeons. Claimant underwent biceps repair surgery by Dr. Wilson. Claimant was referred to Dr. Fox for the cervical spine, and Dr. Fox referred Claimant to Dr. Hicks for an epidural steroid injection. Dr. Hicks eventually declared Claimant at maximum medical improvement and released Claimant with restrictions. Claimant had ongoing numbness and tingling at the right shoulder. Respondent could not accommodate any permanent restrictions and terminated Claimant's employment.

Dr. Amundson provided additional medical treatment for the cervical spine after he performed a Court-ordered independent medical examination. Ultimately, Dr. Amundson performed a cervical discectomy/fusion from C5-7. Upon completion of active treatment, Dr. Amundson ordered an FCE. Based on the FCE, Dr. Amundson released Claimant on May 2, 2018, with permanent restrictions of limited lifting up to forty-five pounds floor to knuckle, lifting up to twenty-five pounds knuckle to chest, and limited lifting up to twenty-five pounds overhead. Dr. Amundson did not treat Claimant's right shoulder or address whether restrictions for the right shoulder were indicated.

Claimant looked for work after he was released by Dr. Amundson. Claimant applied for work as a truck driver with Randy Long Trucking, and interviewed with the owner, Randall Long. Claimant and Mr. Long confirmed they were not friends when Claimant applied for work. During the interview with Mr. Long, Claimant told Mr. Long about his permanent work restrictions. Mr. Long offered Claimant work as a truck driver transporting loads to construction and agricultural sites, but Mr. Long told Claimant he would be terminated if he exceeded the work restrictions imposed by Dr. Amundson. Claimant has worked as a truck driver at Randy Long Trucking full-time since May 14, 2018, and works whenever weather conditions allow him to drive a truck off paved roads. Claimant essentially drives the truck only, and does not inspect the truck before driving, perform repairs of the truck or help in the loading or unloading of the truck. Claimant continues working at Randy Long Trucking.

Claimant is paid by the hour at Randy Long Trucking, and receives contributions to his 401(k) retirement account. According to the pay records documenting Claimant's earnings for seventy-four weeks actually worked from May 14, 2018 through October 10, 2019, Claimant's average actual earnings were \$720.98. Claimant's actual earnings included the pay he received when he worked a job under a federal contract requiring the workers to be paid at a significantly higher hourly pay rate from May 20 to June 2, 2019. If Claimant's pay were adjusted to reflect the pay rate he normally received from Randy Long Trucking, rather than the federal pay rate, Claimant's average earnings would be \$678.13. Claimant worked less than forty hours per week for thirty-four weeks on account of bad weather.

Claimant continues to experience residual pain in his neck and right shoulder on account of the work injuries. Claimant has problems sleeping. Claimant used to hunt and fish, and he can no longer perform those activities. Claimant cannot ride his motorcycle as long as he used to because he develops bilateral arm numbness while riding. Claimant is taking over-the-counter pain medications eight to nine times a week for his symptoms, but has seen no medical providers for his ongoing problems since he was released by Dr. Amundson.

Dr. Amundson confirmed he treated Claimant's cervical spine, but not the right shoulder. Claimant's surgery, a two-level anterior cervical discectomy and fusion, was notable for Claimant losing function of the right upper extremity and both legs twenty minutes after the surgery. Claimant regained function of the right arm and both legs, but Claimant's post-operative recovery was complicated. Dr. Amundson thought Claimant's post-operative complications resolved. Dr. Amundson provided an impairment rating addressing only the cervical spine, and not including the right shoulder. Dr. Amundson initially rated Claimant's functional impairment at 17% of the body as a whole under the Fifth Edition of the *AMA Guides to the Evaluation of Permanent Impairment (AMA Guides)*, and later opined Claimant's functional impairment under the Fourth and Sixth Editions of the *AMA Guides* was also 17% of the body as a whole. Dr. Amundson did not explain the basis for his ratings under the Fourth or Sixth Editions. Dr. Amundson's work restrictions

were referable to the cervical spine only. Dr. Amundson thought Claimant would require future medical treatment on account of his cervical surgery, and thought Claimant may require future anti-inflammatories, muscle relaxants and epidural steroid injections. Dr. Amundson also thought Claimant was at risk of accelerated development of degeneration of the discs in the adjacent levels of the cervical spine.

Dr. Zimmerman evaluated Claimant on April 24, 2019. Complaints of cervical and right shoulder pain were noted, and Dr. Zimmerman reviewed Claimant's course of medical treatment. Both the cervical spine and the right shoulder were evaluated and addressed in Dr. Zimmerman's report and testimony. Dr. Zimmerman rated Claimant's functional impairment at 25% of the body as a whole under the *AMA Guides*, Sixth Edition, which was based on 19% of the body as a whole for the cervical spine and 7% of the body as a whole for the right shoulder after deducting the impairment attributable to Claimant's preexisting condition. Dr. Zimmerman rated Claimant's functional impairment at 42% of the body as a whole under the *AMA Guides*, Fourth Edition, which was based on 35% of the body as a whole for the cervical spine and 11% of the body as a whole for the right shoulder after deducting the impairment attributable to Claimant's preexisting condition. Future medical treatment, in the form of prescription medication and physician monitoring, and pain management, was recommended by Dr. Zimmerman. Dr. Zimmerman recommended permanent restrictions based on the injuries to the cervical spine and right shoulder. Dr. Zimmerman reviewed the task list prepared by Mr. Thomas, and opined Claimant sustained a 100% task loss.

Mr. Thomas performed a vocational assessment of Claimant on July 22, 2019. Mr. Thomas reviewed Claimant's education and vocational training, and noted Claimant did not have transferable skills in welding or HVAC. Mr. Thomas reviewed Claimant's vocational history and prepared a list of the essential job tasks Claimant performed for the five years before the date of accident. Claimant reviewed with Mr. Thomas the work restrictions imposed as a result of the work-related injuries and his current work. Claimant confirmed he was capable of driving a truck. Mr. Thomas understood Claimant was making less money than he did while working for Respondent. Notably, Mr. Thomas understood Claimant's current job was essentially a made-up job created for him by a friend. Mr. Thomas thought Claimant was incapable of competing in the open labor market and his current work was "sheltered employment." Mr. Thomas thought Claimant was currently maximizing his wage-earning potential. Mr. Thomas did not think the earnings Claimant made while working the federal job from May 20 through June 2, 2019 should be considered as part of the wage-earning capacity analysis because those earnings were artificially high and were "outliers." Mr. Thomas thought Dr. Amundson's restrictions indicated Claimant could perform work in the light category.

The ALJ found the opinions of Dr. Zimmerman on the nature and extent of Claimant's impairment more credible than those of Dr. Amundson because they were based on the correct version of the *AMA Guides* and they considered all of Claimant's injuries. The ALJ concluded Claimant's functional impairment was 25% of the body as a

whole, based on the *AMA Guides*, Sixth Edition, referable to the cervical spine and right shoulder. The ALJ denied the request for permanent partial disability compensation based on work disability because Claimant was working as a truck driver and did not sustain a wage loss greater than 10% based on consideration of Claimant's actual earnings for the entire seventy-four week period documented in the Randy Long Trucking records, the most recent twenty-six week period or the most recent twenty-four week period after removing the wages earned while working the federal job. The ALJ did not find Mr. Thomas' testimony sufficient to overcome the presumption Claimant's actual earnings reflected his wage-earning capacity. The ALJ also awarded Claimant reimbursement for payment of any valid, authorized and related medical expenses by Respondent and Insurance Carrier. Claimant was also awarded future medical treatment and unauthorized medical. Finally, Respondent and Insurance Carrier were awarded a credit of \$3,873.81 for a prior overpayment of temporary total disability to be applied to the final weeks of permanent partial disability compensation awarded. Claimant appealed.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the use of the *AMA Guides*, Sixth Edition, in determining his functional impairment and resulting award of permanent partial disability compensation is unconstitutional. Claimant also argues he is entitled to permanent partial disability compensation based on work disability because his actual earnings do not reflect his wage earning capability because it is "sheltered employment", and he is actually unable to compete in the open labor market. On the other hand, Respondent argues the ALJ's denial of work disability was correct. Respondent disputes entitlement to future medical treatment. Respondent reiterated the request for a credit of the prior overpayment of temporary total disability compensation.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

1. The Appeals Board does not possess the authority to rule on the constitutionality of the Kansas Workers Compensation Act.

Claimant asserts the provision for permanent partial disability compensation contained in the Award is erroneous because the use of the *AMA Guides*, Sixth Edition, to determine Claimant's functional impairment is unconstitutional. The Kansas Court of Appeals ruled use of the *AMA Guides*, Sixth Edition, is unconstitutional in all workers compensation cases, and the Kansas Supreme Court granted a petition for review.⁴ The Kansas Supreme Court's review is pending. A case being reviewed by the Supreme Court does not have precedential value pending review.⁵ The Appeals Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.⁶ Therefore, the Board cannot address the constitutionality of the use of the *AMA Guides*, Sixth Edition, in determining Claimant's permanent impairment.

2. Claimant is entitled to an award of future medical treatment.

Respondent contends the provision for future medical treatment contained in the Award is erroneous. The employer's liability to pay compensation attaches when an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.⁷ The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.⁸ An injury arises out of employment only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.⁹ It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement.

⁴ See *Johnson v. U.S. Food Service, Inc.*, 56 Kan. App. 2d 232, 427 P.3d 996 (2018), review granted (Feb. 28, 2019).

⁵ See Rule 8.03(k)(2).

⁶ See, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (holding use of the *AMA Guides*, Sixth Edition, for a scheduled injury was unconstitutional as applied in that case only).

⁷ See K.S.A. 44-501b(b).

⁸ See K.S.A. 44-510h(a).

⁹ See K.S.A. 44-508(f)(2)(B)(ii).

“Medical treatment” means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.¹⁰

In this case, both Dr. Amundson, the authorized treating orthopedic surgeon who operated on Claimant’s cervical spine, and Dr. Zimmerman, Claimant’s evaluating physician, thought Claimant would require future medical treatment necessitating the intervention of a physician. Both doctors testified Claimant was at a greater risk of accelerated degeneration at the levels of the cervical spine adjacent to the fusion site on account of his surgery. There is no evidence Claimant will not require future medical treatment. Claimant met his burden of proving with medical evidence it is more probably true than not future medical treatment will be required after maximum medical improvement. Therefore, the award of future medical treatment is affirmed.

3. Respondent is entitled to a credit of \$3,873.81 for the prior overpayment of temporary total disability compensation to be applied against an award of permanent disability compensation, as provided in K.S.A. 44-525(c).

Respondent reiterated its request for a credit for its prior overpayment of temporary total disability compensation to be applied against an award of permanent disability compensation. It is undisputed Respondent overpaid \$3,873.81 in temporary total disability compensation, and Respondent’s request for a credit was not contested by Claimant. The Kansas Workers Compensation Act provides for a credit for the overpayment of temporary total disability compensation against an award of additional disability benefits. The credit shall be first applied to the final week of any additional disability benefit awarded and then to each preceding week until the credit is exhausted.¹¹ The credit to Respondent and Insurance Carrier for the overpayment of temporary total disability compensation of \$3,873.81 contained in the Award is affirmed, and shall be provided pursuant to K.S.A. 44-525(c).

4. Claimant is entitled to an award of permanent partial disability compensation based on 25% functional impairment to the body as a whole, and is not currently eligible to receive permanent partial disability compensation based on work disability considerations.

The primary issue on appeal is the nature and extent of Claimant’s disability. In the Award, ALJ Bogdan concluded Claimant did not sustain a 10% loss of wage-earning capacity and was entitled to an award of permanent partial disability compensation based on 25% functional impairment of the body as a whole, using the *AMA Guides*, Sixth Edition. Claimant contends the award is erroneous because determining Claimant’s functional

¹⁰ See K.S.A. 44-510h(e).

¹¹ See K.S.A. 44-525(c).

impairment under the *AMA Guides*, Sixth Edition, is unconstitutional and should be based on the *AMA Guides*, Fourth Edition, and because Claimant sustained greater than a 10% loss of wage-earning capacity, making him eligible to receive permanent partial disability compensation based on work disability. The Board addresses Claimant's arguments in turn.

A. Claimant's functional impairment due to the work-related injuries to the right shoulder and cervical spine is 25% to the body as a whole, based on the *AMA Guides*, Sixth Edition.

First, Claimant contends the ALJ's determination Claimant's functional impairment is 25% of the body as a whole is erroneous. Claimant argues the Board should use the *AMA Guides*, Fourth Edition, because use of the *AMA Guides*, Sixth Edition, is unconstitutional. As stated above, the Court of Appeals' decision in *Johnson* is not currently binding, and the Board does not possess the authority to independently invalidate a provision of the Kansas Workers Compensation Act. Claimant sustained injuries to the cervical spine and the right shoulder, which is compensated as an injury to the body as a whole.¹² The extent of permanent partial disability shall be the percentage of functional impairment Claimant sustained as established by competent medical evidence and based on the *AMA Guides*, Sixth Edition, because the accident occurred after January 1, 2015.¹³

Dr. Zimmerman rated Claimant's impairment at 25% of the body as a whole under the *AMA Guides*, Sixth Edition. Dr. Zimmerman based his rating on 19% impairment of the body as a whole for the cervical spine injury and fusion, and 7% of the body as a whole for the right shoulder injury and surgery, after deducting Claimant's preexisting impairment. Dr. Amundson initially rated Claimant's impairment at 17% of the body as a whole under the *AMA Guides*, Fifth Edition, based on the cervical spine only. Dr. Amundson subsequently rated Claimant's impairment at 17% of the body as a whole under the *AMA Guides*, Sixth Edition, without elaboration. Again, Dr. Amundson only rated the cervical spine and did not address the right shoulder. The Board finds the opinions of Dr. Zimmerman more credible because Dr. Zimmerman's rating considers all of the injured parts of Claimant's body and because Dr. Zimmerman explained the basis for his rating under the correct edition of the *AMA Guides*. The Board finds Claimant sustained 25% functional impairment of the body as a whole attributable to the cervical spine and right shoulder due to the compensable injuries he sustained on February 3, 2015.

¹² See K.S.A. 44-510e(a).

¹³ See K.S.A. 44-510e(a)(2)(B).

B. Claimant is not eligible to receive work disability benefits in excess of his functional impairment because he has not sustained a 10% or greater loss of his wage-earning capacity due to his work-related injuries.

Claimant also contends the Award was erroneous because Claimant was not awarded permanent partial disability benefits based on work disability. Claimant argues his wage-earning capacity results in greater than 10% wage loss, and his actual earnings should not be considered because Claimant was engaged in sheltered employment and his actual wages are skewed upward because of two “outlier” pay periods where Claimant’s earnings were markedly higher than the other pay periods. Claimant’s arguments are supported by the opinions of Mr. Thomas, who opined Claimant’s actual earnings were not reflective of his wage-earning ability because his current work was sheltered employment provided by a friend, and the earnings from the work Claimant performed at the federal job were not an accurate reflection of the earnings Claimant could actually make in his usual work for Randy Long Trucking.

Under the Kansas Workers Compensation Act, an employee may be eligible to receive work disability compensation in excess of permanent partial disability compensation based on functional impairment if the employee’s functional impairment caused solely by the injury exceeds 7.5% impairment of the body as a whole, or exceeds 10% impairment of the body as a whole where there is preexisting functional impairment, and the employee sustains a post-injury wage loss, as defined in K.S.A. 44-510e(a)(2)(E), of at least 10% directly attributable to the work injury.¹⁴ “Wage loss” is defined as,

[T]he difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of the worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker’s age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.¹⁵

¹⁴ See K.S.A. 44-510e(a)(2)(C).

¹⁵ See K.S.A. 44-510e(a)(2)(E).

In considering actual earnings, the Board compares “apples to apples”, by comparing average post-injury earnings to the average weekly wage, rather than comparing individual or “cherry-picked” weeks.¹⁶ In the past, the Board considered average post-injury earnings ranging from a 34.71-week period to a 67.29-week basis and an annual basis, which have been approved by the appellate courts.¹⁷

Claimant’s functional impairment exceeds the statutory functional impairment threshold for work disability benefits. Claimant’s average actual earnings from Randy Long Trucking over a seventy-four-week period, however, is \$720.98. Although the ALJ also considered Claimant’s earnings over a reduced, twenty-six-week period, this exercise was unnecessary because a larger period of time may be considered. Claimant argues the earnings for two pay periods should not be included in determining Claimant’s post-injury wages, but doing so requires the Board to engage in “cherry picking” disfavored by the Supreme Court in *Graham*. Claimant’s argument also runs afoul of the plain language of K.S.A. 44-510e(a)(2)(E), which requires consideration of the average weekly wage Claimant is actually earning to presumptively prove his wage-earning capacity. The Board opts to consider an average of Claimant’s actual earnings to determine the average weekly wage Claimant is actually earning, which is \$720.98. Compared to Claimant’s average weekly wage with Respondent of \$745.45, Claimant sustained a 3.3% wage loss. Unless Claimant overcomes with competent evidence the presumption his actual post-injury wages reflect his earning capacity, he is ineligible to receive permanent partial disability compensation based on work disability because he did not establish a 10% or greater loss in wage-earning capacity.

Claimant argues the testimony of Mr. Thomas is the competent evidence needed to overcome the presumption his average actual weekly earnings of \$720.98 reflect his wage-earning capacity. Mr. Thomas’ opinions are premised on the belief Claimant was incapable of competing in the open labor market, and was performing sheltered employment in a made-up job created by a friend. Mr. Thomas thought Claimant’s wage earning capacity was maximized in his regular work and earnings at Randy Long Trucking, and the money Claimant earned in the federal job for two weeks was artificially high, and not reflective of the usual earnings received for the work Claimant performed in this area. Mr. Thomas’ premise, however, is not supported by the record. Claimant applied for work and interviewed with Mr. Long. Claimant told Mr. Long about his restrictions, and Mr. Long had work benefitting his company Claimant could perform. Claimant and Mr. Long were not friends when Claimant was hired, and the work Mr. Long provided was not made-up. Driving a truck is a real job. Although Claimant was fortunate to be hired by Mr. Long, it cannot be said Claimant was the recipient of charity. Rather, Claimant competed in the

¹⁶ See *Banuelos v. Eurest*, No. 1,048,817, 2016 WL 4607974, at *7 (Kan. WCAB Aug. 17, 2016) (citing *Graham v. Doktor Trucking Group*, 284 Kan. 547, 556, 161 P.3d 695 (2007)).

¹⁷ See *Banuelos*, 2016 WL 4607974, at *10.

open labor market and was successful. Claimant actually performed the federal job and received the monetary benefit of significantly higher earnings, along with his coworkers. Because Mr. Thomas' opinions are based on a faulty assumption of Claimant's employment at Randy Long Trucking, they do not overcome the statutory presumption Claimant's actual earnings reflect his wage-earning capability. Moreover, if Claimant's normal pay rate at Randy Long Trucking was imputed to the federal job, it would produce an average weekly wage of \$678.13, which would result in a wage loss of 9.0%. Claimant would remain ineligible to receive permanent partial disability compensation based on work disability.

CONCLUSION

The Board does not have the authority to deem a provision of the Kansas Workers Compensation Act unconstitutional, and the Court of Appeals' decision in *Johnson* is not currently binding precedent. The award of future medical treatment is supported by the record. Respondent and Insurance Carrier are entitled to a credit for the prior overpayment of temporary total disability compensation, as provided in K.S.A. 44-525(c). Finally, Claimant is ineligible to receive permanent partial disability benefits based on work disability considerations, and the award of permanent partial disability compensation based on 25% functional impairment to the body as a whole, based on the *AMA Guides*, Sixth Edition, for injuries to the cervical spine and right shoulder, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge David J. Bogdan, dated March 5, 2020, is affirmed.

IT IS SO ORDERED.

Dated this 16th day of July, 2020.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

c: (Via OSCAR)

Michael J. Unrein
Timothy A. Emerson
Hon. David J. Bogdan